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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-468

UNITED AIR LINES, INC.,
Petitioner,

vs.

MARY BURKE SPROGIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 12

I. Violation of Section 703 and the BFOQ 12

II. The Defense of Good Faith Reliance Under Section 713(b) and Intentional Violation Under Section 706(g) 16

III. The Class Action 24

Conclusion 28

Appendix:

Order of District Court, November 28, 1969 ..... A1

Order of District Court, January 21, 1970 ..... A2

Findings of Fact and Conclusions of Law, District Court A3

Decree, District Court A8

Opinion, Court of Appeals A12

Dissent A25

Order Denying Petition for Rehearing, Court of Appeals A36

Relevant Sections of Title VII, Civil Rights Act of 1964 ..... A37

Rule 23, Rules of Civil Procedure A40

Table of Authorities.

Cases.

Adickes v. S. H. Kress & Co., 398 U. S. 144 (1970).... 21

Air Transport Ass'n v. Hernandez et al., 264 F. Supp. 227 (Dist. Col., 1967)..... 23

American Fidelity and Casualty Ins. Co. v. London and Edinburgh Ins. Co., 354 F. 2d 214 (C. A. 4, 1965)... 19

American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, 388 F. 2d 272 (C. A. 2, 1967)..... 21

Danner v. Phillips Petroleum Co., 3 Fair Employment Practice Cases 858 (C. A. 5, No. 30267, August 23, 1971) 26

Diaz v. Pan American World Airways, 442 F. 2d 385 (C. A. 5, 1971)..... 13

Gerstle v. Continental Airlines, Inc., 50 F. R. D. 213 (Colo., 1970)..... 27

Hardy v. U. S. Steel Corp., 289 F. Supp. 200 (Ala., 1967) 27

Hart v. Johnston, 389 F. 2d 239 (C. A. 6, 1968)..... 19

Jenkins v. United Gas Corp., 400 F. 2d 28 (C. A. 5, 1968) 25

Kam Koon Wan v. E. E. Black Ltd., 75 F. Supp. 553 (Hawaii, 1948)..... 23

Manning v. General Motors, 3 Fair Employment Practice Cases 104 (U. S. D. C. Ohio, No. C 69-334, January 6, 1971)..... 27

Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (C. A. 5, 1968) 25

Pan American World Airways v. Diaz, pet. for cert. pending, Docket No. 71-194 14

Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971) 12, 13, 14, 16

Poller v. Columbia Broadcasting System, 368 U. S. 464 (1962) 24

Rains v. Cascade Industries, Inc., 402 F. 2d 241 (C. A. 3, 1968) 19

Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (Ore., 1969) 20

M. Snower & Co. v. United States, 140 F. 2d 367 (C. A. 7, 1944) 19

United States v. Diebold, 369 U. S. 654 (1962) 21

Walling v. Richmond Screw Anchor Co., 154 F. 2d 780 (C. A. 2, 1946) 19

Statutes.

Portal-to-Portal Act, §§ 9 and 10, 29 U. S. C. §§ 258-259 23

Other.

110 Congressional Record 8194, 12723-24 20

35 Federal Register 18692 23

6 Moore, Federal Practice, 2d ed. 19

Notes of Advisory Committee on Rules, 28 U. S. C. foll. Rule 23 25

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MARY BURKE SPROGIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner United Air Lines, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 16, 1971, in Case No. 18481, Mary Burke Sprogis *vs.* United Air Lines, Inc.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Decree of the District Court for the Northern District of Illinois are reported at 308 F. Supp. 959 (1970) (*infra*, pp. A3-A11). The opinion of the Court of Appeals is at 444 F. 2d 1194 (C. A. 7, 1971) (*infra*, pp. A12-A35).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 16, 1971. Petition for rehearing *en banc* was denied on July 16, 1971 (*infra*, p. A36). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1.(a) Whether it is a discrimination based on sex under Section 703(a)(1) of the Civil Rights Act of 1964 for an employer who hires only females for a particular job to terminate a female from that job because she fails to meet other qualifications not proscribed by Section 703(a)(1), which other qualifications are not required for any other job with the employer, whether held by a male or female.

(b) Whether, assuming the foregoing to be a discrimination within the meaning of Section 703(a)(1), it is then relevant to determine whether female sex is a bona fide occupational qualification for the job under Section 703(e) of the Act.

(c) Whether, assuming female sex to be a bona fide occupational qualification, the employer may lawfully impose other qualifications, not proscribed by Section 703, upon the job.

2. Whether the Court of Appeals by granting summary judgment to respondent denied to petitioner—

(i) its right under Section 713(b) of the Act to "plead and prove" that its alleged unlawful employment practice was "in good faith, in conformity with, and in reliance on a written interpretation or opinion of" the Equal Employment Opportunity Commission; and

(ii) its right to prove that it had not intentionally engaged in an unlawful employment practice within the meaning of Section 706(g).

3. Whether an individual action for alleged violation of the Civil Rights Act of 1964 may be converted into a class action after judgment on the merits.

STATUTES INVOLVED.

Pertinent parts of the relevant Sections of Title VII of the Civil Rights Act of 1964 are set out at pp. A37-A39, *infra*. These are Section 703(a)(1), 42 U. S. C. § 2000e-2(a)(1); Section 703(e), 42 U. S. C. § 2000e-2(e); Sections 706(f) and (g), 42 U. S. C. §§ 2000e-5(f) and (g); Sections 713(a) and (b), 42 U. S. C. §§ 2000e-12(a) and (b).

Rule 23 of the Federal Rules of Civil Procedure is set out at p. A40.

STATEMENT OF THE CASE.

United had for many years maintained a policy that employees performing the function of stewardesses be female and unmarried. The no-marriage rule applied to no other employee—male or female—and it was United's policy to offer other employment to all stewardesses upon their becoming married. In June 1966, respondent Mary Burke Sprogis was terminated as a stewardess upon her marriage, at which time she was offered other employment with United. Mrs. Sprogis declined the offer. (App. 67.)[1]

1. A copy of the Joint Appendix printed for use in the Court of Appeals will be filed with the Clerk of the Court at the time of the docketing of this petition. Reference to the Joint Appendix shall be "App. ....."

After refusal of an offer of reinstatement with waiver of back pay,[2] in early November 1968, Mrs. Sprogis filed her individual complaint in this action on November 27, 1968, alleging that her termination upon marriage was a discrimination because of her sex and an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 (the "Act"). Jurisdiction was based on Section 706(f), 42 U. S. C. § 2000(e)-5(f) of the Act.

Background.

An understanding of the proceedings below, particularly United's defense of good faith reliance, requires a preliminary discussion of the background facts leading to the filing of this action.

United is a common carrier engaged in scheduled air transportation within the continental limits of the United States and Canada and overseas to Hawaii. (App. 58-59.)

In 1930, United introduced stewardesses in its operations to provide in-flight services for its passengers. From the outset, the position was limited to females, and this requirement still persists. (App. 59-61.) Although a limited number of airlines in the United States originally hired males as cabin attendants in domestic operations, they abandoned this practice at various times, and at present all scheduled airlines hire only females for this position. (App. 62.)[3]

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2. In January 1969, respondent was offered unconditional reinstatement which she accepted. She returned as a stewardess in April 1969, after giving birth to a daughter in late January 1969 (App. 66, 77, 78).

3. United also employs a male cabin attendant on its flights to Hawaii and on its charter flights for the U. S. Military Airlift Command to Hawaii, the Philippines, Okinawa and Viet Nam. He is additional personnel to the stewardess and does not perform the same job. No contention has been made that the jobs are the same, and the decision of the Court below did not rest on such a contention. If this were an issue, United would be entitled to a hearing on the question. Its affidavit setting out the differences in the jobs was unopposed.

Until the mid-1930s, United did not require that its stewardesses be unmarried. At that time, in response to complaints arising out of irregular work schedules, United adopted the no-marriage rule which remained in effect until November 1968. (App. 61, 63-5.)

The Civil Rights Act of 1964 was enacted on July 2, 1964, and Title VII, 42 U. S. C. § 2000e *et seq.* relating to employment practices, became effective one year later. Section 703(a)(1) provided that it would be an unlawful employment practice for an employer to discriminate in the employment of any individual because of the individual's race, color, religion, sex or national origin. An exception was provided in Section 703(e) to the effect that it would not be an unlawful employment practice to discriminate on the basis of religion, sex or national origin where the discrimination was based on a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise—the so-called "BFOQ" exception.

On September 16, 1965, the Chairman of the Equal Employment Opportunity Commission ("the Commission"), an agency established under Title VII to investigate charges of unfair employment practices, announced that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex and is prohibited by the Act. (App. 26.)

The Air Transport Association, of which United is a member, asked the Commission whether this announcement was applicable to airline stewardesses. (App. 26-27.) This inquiry was referred by the Commission to its General Counsel, who responded by letter of opinion on September 22, 1965, stating, in part, that "if sex is a bona fide occupational qualification for the job of airline stewardesses, it would follow that an airline company could impose further qualifications with respect to such jobs and require

that the employee be single and under a certain age. These additional qualifications would be consistent with the original qualifications that the employee be a woman." His opinion concluded that until it was determined whether sex was a bona fide occupational qualification, the Chairman's ruling regarding single status "cannot apply to airline stewardesses." (App. 27-28.)

The Commission subsequently conducted a hearing on the question of whether sex was a BFOQ for "cabin attendants." In February 1968 it issued its opinion holding that sex was not a BFOQ, and further stated that the legality of various other airline practices and policies, including their no-marriage policies, would be resolved on a case-by-case basis for each airline pursuant to charges filed with the Commission. (App. 36, 38.)

After her discharge in June 1966, respondent Sprogis filed a charge with the Commission alleging that her termination was an unlawful discrimination based on sex. (App. 15.) In August 1968 the Commission found there was "reasonable cause to believe that Respondent [United] has violated Title VII of the Civil Rights Act of 1964 by maintaining the policy of terminating female flight cabin attendants as a result of marriage and by terminating Charging party [Sprogis] pursuant to said policy." (App. 18-19.)

United did not learn of this decision until October 28, 1968 (App. 39), and shortly thereafter entered into negotiations with the Air Line Pilots Association ("ALPA"), the collective bargaining representative for United's stewardesses, for elimination of the no-marriage rule. (App. 66.) These negotiations culminated in agreement on November 7, 1968 "that marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess." (App. 75.)

Proceedings in the Trial Court.

In answer to the complaint alleging that it had discriminated unlawfully against respondent Sprogis because of her sex, United admitted the maintenance of its no-marriage policy and her termination, but denied the policy was a violation of the Act.

United specifically denied respondent's allegation that the alleged violation was intentional.

United further answered that it continued the policy and applied it to respondent in good faith, in conformity with and in reliance on a written interpretation or opinion of the Commission, and therefore, under the express provisions of Section 703(b) of the Act, United was relieved of any and all liability or punishment for the alleged unlawful employment practice. (App. 21-3.)

Respondent and United each moved for summary judgment. (App. 11, 24.) Respondent's grounds were that the existence of the no-marriage policy and her discharge thereunder were undisputed; that since the policy was limited to stewardesses and not applicable to male employees, the policy was a violation of the sex discrimination prohibitions of the Act.

United's grounds for its motion for summary judgment were (1) its defense of good faith reliance under Section 713(b) of the Act, and (2) that its policy was applicable only to stewardesses and not other female employees, that it was a discrimination among persons of the same sex performing the same work, and was not based on sex but on marital status, and hence was not discrimination within the meaning of the Act.

United opposed respondent's motion for summary judgment on the grounds asserted in its own motion and on the additional alternative ground that both sex and marital status were bona fide occupational qualifications for the

position of stewardess reasonably related to United's business, and hence any discrimination was not a violation of the Act; that this raised disputed questions of fact on respondent's theory of the case which could not be determined in her favor on summary judgment.

Both parties filed affidavits. Respondent's affidavit related to her compliance with the procedural requirements of the Act. (App. 14.) United's affidavits related to its reliance on the Commission's opinion and the bona fide occupational qualifications of both sex and marital status for the position of stewardess. (App. 25, 58.)

Without opinion, the Court granted respondent's motion for summary judgment, denied United's motion for summary judgment, and directed respondent to file suggested Findings of Fact and Conclusions of Law. (App. 82; *infra*, p. A1.) United's motion to clarify and reconsider was denied. (App. 83, 86.)

Respondent included among its suggested Conclusions of Law that "the Court should and hereby does retain jurisdiction for the purpose of determining whether the scope of relief herein ordered should be made applicable to other Stewardesses discharged by Defendant pursuant to the policy herein determined to be illegal as in violation of Title VII of the Civil Rights Act of 1964."

Respondent's proposed findings and conclusions, including the attempt to convert the individual action to a class action after judgment on the merits, were adopted by the Court without modification over United's objections. (*Infra*, p. A7.)

The court ordered United to restore respondent to employment (although she had by then been reinstated for over nine months), and directed that she be compensated in full for all pay lost from the date of her discharge to the date of reinstatement. (*Infra*, pp. A8-9.)

The trial court made no findings relating to United's defense of good faith reliance, nor did it find that United intentionally engaged in an unlawful employment practice; no findings were made respecting United's defense of bona fide occupational qualification. The court simply concluded as a matter of law that "The matters asserted by Defendant by way of defense are not sufficient to show (a) that sex or single status is a bona fide occupational qualification for the position of airline stewardess, or (b) that Defendant acted in reliance upon a written opinion of the Equal Employment Opportunity Commission within the meaning of Section 713(b) of the Civil Rights Act of 1964." (*Infra*, p. A6.)

The Decision of the Court of Appeals.

In affirming, the Court of Appeals divided on every major issue. The majority concluded a violation of the sex discrimination prohibition of Section 703(a)(1) had been demonstrated because men and women were not treated alike, even though the majority acknowledged that the no-marriage policy was applied only to stewardesses, and to no other male or female employee in any other job; the dissent found that no violation had been established since only females and no males were eligible for the position ". . . United did not violate § 703(a)(1) by discharging plaintiff [respondent] from a position which she could not have retained had she been a man." (*Infra*, p. A32.)

The majority further held that the defense of female sex as a BFOQ under Section 703(e) was irrelevant to the question of discrimination because, even assuming it was a BFOQ to hire only females for the position, that "would not automatically legitimate the no-marriage rule imposed exclusively upon stewardesses." (*Infra*, p. A18.) In disagreement were not only the dissenting opinion but also the Commission and counsel for Mrs. Sprogis, both of whom

agreed that if female sex was a BFOQ for the position, then additional requirements applied only among these females, including single status, would not be a violation of the Act. (See *infra*, p. A27.)

The majority further held, without giving United an opportunity to be heard, that the concept of marital status as a BFOQ is not supported by any "salient rationale". The dissent concluded that the facts disclosed in United's affidavit "entitled it to a hearing on the merits of its Section 703 defense." (*Infra*, p. A33.)

The majority disposed of United's defense of good faith reliance under Section 713(b) by concluding that the "memorandum" upon which United relies "was not intended as the basis for employer reliance now claimed by United." (*Infra*, p. A22.) Thus, the statutory defense which United is entitled to "plead and prove" was summarily decided against it. In reaching this conclusion, the majority relied on "representations of the Commission itself, before this Court as *amicus curiae* [which], disclose that the purported 'letter of opinion' was instead [an] . . . internal agency memorandum." (*Infra*, p. A21.) The representations upon which the majority relied were unsupported by any factual presentation, were not a matter of record in the trial court, and were first advanced on appeal. The majority opinion furthermore does not indicate how this representation can be supported in view of what is a matter of record, namely, the Commission's description of this "internal memorandum" as a General Counsel Opinion in its own publication. (App. 28.) The dissenting opinion observed that the record raised issues of fact on this question and that a sufficient showing had been made by United "to foreclose the entry of summary judgment." (*Infra*, p. A33.)

With respect to the trial court's retention of jurisdiction to consider whether, after judgment on the merits, the

instant action should be converted into a class action, the majority held: "In our opinion, Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases." (*Infra*, p. A23.) The minority concluded:

> "At a minimum, this rule [Rule 23(c)(1)] requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages of back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." (*Infra*, p. A35.)

REASONS FOR GRANTING THE WRIT.

This case presents three questions of importance in the administration of the Civil Rights Act of 1964. The Court below divided on each of these issues. The resolution by the majority has created confusion over the meaning of the act, is in conflict with the decision of this Court in *Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971), has created conflict among the circuits, and is a complete departure from the accepted and usual course of judicial procedure relating to summary judgment and class action.

I.

VIOLATION OF SECTION 703 AND THE BFOQ.

The majority has confused the requirements which must be affirmatively shown to establish a violation of Section 703(a)(1) and the defense of bona fide occupational qualification ("BFOQ") under Section 703(e) once such a violation has been established. The majority has compounded the confusion by holding that even if a BFOQ defense has been established, nonetheless a violation of Section 703 persists if there exists a further, non-proscribed discrimination among the class in whose favor the BFOQ exists. The consequence of this process is that Title VII may be judicially extended to an infinite number and kinds of bona fide qualifications, none of which have been declared to be unlawful discriminations by Congress.

Section 703(a)(1) states it to be an unlawful employment practice to discriminate against an individual "because of such individual's race, color, religion, sex, or national origin."

Since only members of her sex were employed in the job from which she was terminated, respondent suffered no discrimination because of her sex. When she left, only another female was eligible to take her place. The discrimination was because of her marital status, and marital status is not a proscribed basis for discrimination, any more than are the height and weight limitations, and "well-poised manner and a modulated, cultured voice" also required of United's Stewardesses. (App. 72.)

A male seeking the stewardess job might state a claim of violation of the Act since he would be denied employment because of his sex. See *Diaz* v. *Pan American World Airways*, 442 F. 2d 385 (C. A. 5, 1971), pet. for cert. pending, Docket No. 71-194. But a female, being a member of the sex favored rather than discriminated against, cannot meet the statutory requirements.

The majority responds to this proposition by asserting that sex discrimination was practiced against respondent because males in other positions were not terminated upon marriage. But females in other positions were not terminated upon marriage either; in fact respondent was offered—and refused—other employment with United upon her marriage. Neither married males nor married females were eligible for the position of stewardess. That single males were also not eligible may have been a discrimination against them based on their sex, but not against Mrs. Sprogis because of her sex.[4]

That the position was limited to females was to the majority an issue going to the BFOQ defense under Section 703(e) and not one critical to the question of the existence

4. Thus, the circumstances here are essentially different from those tested in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). There men and women were both eligible for the job of assembly trainee which Mrs. Phillips sought. Women with preschool age children were not eligible; no such limitation was imposed on males.

of a violation under Section 703(a). In this respect, we submit, the majority misread the statute and Judge Stevens correctly concluded that no violation of Section 703(a) was shown; hence no reliance on Section 703(e) was required.

However, assuming that a violation of Section 703(a) is stated under these circumstances, then the defense of sex as a BFOQ under Section 703(e) should have been available to United.[5]

On this assumption United contended it was entitled to a hearing and summary judgment against it was not appropriate. This would seem to follow as a matter of course from *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971), where the Court did find a violation of Section 703(a), but then remanded for a hearing on the BFOQ issue under Section 703(e) since "that is a matter of evidence." (*Id.* at 544.)

The majority of the Court below denied United such a hearing by the simple expedient of finding it "unnecessary to consider the validity of United's claim that sex constitutes a bona fide occupational requirement for the job of airline stewardess." The Court added, "Even assuming that Section 703(e)(1) might justify hiring only females for that position, that conclusion would not automatically legitimate the no-marriage rule imposed exclusively upon stewardesses." And again, the majority cites as its reason the fact that the no-marriage policy was not imposed on male employees. (*Infra*, pp. A17-A18.)

The argument of the majority is thus completely circular:

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5. The issue of female sex as a BFOQ for the position of stewardess in an action brought by a male is now pending before this Court on petition for a writ of certiorari in *Pan American World Airways, Inc.* v. *Diaz*, Docket No. 71-194. The Commission has recognized that the BFOQ must be examined within the framework of the "peculiar requirements of the particular job, and not on the basis of a general principle." See *infra*, p. A17 n. 5.

it finds a sex discrimination violation under Section 703 (a)(1) because the no-marriage policy is applied only to stewardesses and not male employees; however, if sex is assumed to be a bona fide occupational qualification, and hence the discrimination a lawful employment practice under Section 703(e), there is still a sex discrimination violation because the policy is not applied to males.

For all practical purposes, the majority has read Section 703(e) out of the Act.

The Commission and counsel for Mrs. Sprogis expressly disclaimed any such contention. The entire Commission procedure respecting stewardess employment was predicated on the assumption that if female sex were a BFOQ for the position, then "an airline company could impose further qualifications with respect to such jobs and require that an employee be single and under a certain age." (*Infra*, p. A27 n. 10.) It is this position of the Commission which is the basis for United's Section 713(b) defense of good faith reliance. During oral argument before the Court of Appeals, counsel for Mrs. Sprogis, in response to a question from the Court, replied that if female sex was a BFOQ for the position of stewardess, the no-marriage rule would *not* violate the Act. (See *infra*, p. A27.)

The effect of the majority view of the BFOQ defense is to require an employer to defend every unique qualification he may impose on a position which has been properly limited to members of one sex, religion or nationality. Here, for example, a female who is denied employment as a stewardess by United because she is too tall, too short, overweight, or has a gravel voice may state a violation of Section 703(a) and put United to a Section 703(e) defense even if sex—the only discrimination present which is proscribed by the statute—is found to be a bona fide occupational qualification.

And even on this theory of extension of Section 703, the majority has denied United the evidentiary hearing to which it is entitled under the *Phillips* decision. For the Court has decided on summary judgment that United's alternative defense of marital status as a BFOQ under Section 703(e) is "clearly insufficient." "But that is a matter of evidence . . ." *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971). The improper use of summary judgment by the majority is far more dramatic in its treatment of United's Section 713(b) good faith reliance defense, and will be considered more fully in the discussion of that issue.

We respectfully submit that the treatment of Sections 703(a) and (e) by the majority in the Court below leaves Title VII in complete confusion, and is in conflict with *Phillips*. We urge this Court to clarify the correlation between these sections in the interest of orderly administration of the Act.

II.

THE DEFENSE OF GOOD FAITH RELIANCE UNDER SECTION 713(b) AND INTENTIONAL VIOLATION UNDER SECTION 706(g).

Section 713(b) of the Act provides that no person shall be subject to any liability for the commission of an unlawful employment practice—

> "if he *pleads and proves* that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . . Such a defense, if established, *shall be a bar to the action* or proceeding, notwithstanding that . . . after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. . . ." (Emphasis added.)

United pleaded a Section 713(b) defense and supported this with an unopposed affidavit of one of its staff attorneys, outlining a review of its no-marriage policy undertaken by United in November 1965, and his reliance on a Commission opinion in advising United's Senior Vice President-Personnel that the no-marriage policy was legal, and recommending its continuance.

United also denied that the alleged violation was intentional. Section 706(g) provides that "if the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice" then it may order affirmative relief, including back pay.

The opinion on which United relies was drawn on September 22, 1965, by the General Counsel for the Commission. The Chairman of the Commission had previously announced at a press conference that a rule which restricts employment of married women, but not married men, was a prohibited discrimination based on sex. The Air Transport Association, of which United is a member, asked the Commission whether this applied to stewardesses. The inquiry was referred to the General Counsel, whose reply first recapitulated the Chairman's statement which had prompted the Air Transport Association inquiry, then added:

> "A question has arisen whether or not this interpretation applies to airline stewardesses, with respect to whom companies generally require resignation upon marriage and also reassignment within the company or retirement upon attaining the age of 32.
>
> ". . . If an airline may give preference to females only as stewardesses, i.e., if sex is a bona fide occupational qualification for the job of airline stewardesses, it would follow that an airline company could impose further qualifications with respect to such jobs and require that an employee be single and under a certain age. These additional qualifications would be consistent with the original qualification that the employee be a woman.

> "The Commission has not yet determined whether or not sex is a bona fide occupational qualification for the position of airline stewardess . . .
>
> "It would be safe, I believe, to answer any inquiries on this point simply by saying that *the Chairman's ruling of September 16th cannot apply to airline stewardesses* until the Commission has first resolved the question of bona fide occupational qualification." (App. 27-28; emphasis added.)

On November 8, 1965, the Commission published a "Digest of Legal Interpretations issued or adopted by the Commission, July 2, 1965 to October 8, 1965." Included was the following digest of the foregoing opinion:

> "Until the Commission decides whether sex is a bona fide occupational qualification for the job of airline stewardess, the Commission ruling that a company rule or collective bargaining agreement provision which requires female employees to resign upon becoming married (absent a similar rule or provision for male employees) should not be applied to airline stewardesses. GC Opin. 9-22-65." (App. 28.)

A "GC Opinion" was defined by the Commission in its publication as "an interpretative opinion of the General Counsel, *specifically adopted by the Commission.*" (App. 28; emphasis added.)

The Commission subsequently published its "First Annual Digest of Legal Interpretations, July 2, 1965 to July 1, 1966." The introduction stated that, where appropriate, prior entries had been amended or deleted "so as to reflect current Commission policy." The General Counsel Opinion of September 22, 1965, published in its earlier Digest, was repeated verbatim. (App. 28-29.)

United's affidavit states that in November 1965 it undertook a review of the propriety of the no-marriage rule for stewardesses. One of its attorneys was asked to review this as a legal matter. His affidavit states:

> "In recommending that the policy be continued, at least until the EEOC [Commission] decided whether sex was a bona fide occupational qualification for the stewardesses' positions, I specifically cited and relied upon the September 22, 1965 opinion of the EEOC General Counsel." (App. 29.)

The Section 713(b) defense was raised by United both in support of its motion for summary judgment and in opposition to respondent's motion. The trial court issued no opinion supporting its denial of United's motion[6] or granting of respondent's motion, but merely adopted the conclusion of law submitted by respondent that United's Section 713(b) defense is "not sufficient." (*Infra*, p. A6.) No finding respecting intentional violation was made, as required by Section 706(g).

In affirming, the majority of the Court of Appeals disposed of the Section 713(b) defense by holding that the opinion did not support United's interpretation; and further that it was not an opinion, but merely an "internal agency memorandum." The majority concluded: ". . . the memorandum was not intended as the basis for employer reliance now claimed by United." (*Infra*, p. A22.)

With respect to the Section 706(g) requirement for a finding of intentional violation, the majority held this was

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6. That United's motion was denied does not mean it was therefore proper to grant respondent's motion. "It does not follow that, merely because each side moves for summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists." *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780, 784 (C. A. 2, 1946). See also, *American Fidelity and Casualty Ins. Co.* v. *London and Edinburgh Ins. Co.*, 354 F. 2d 214, 216 (C. A. 4, 1965); *Hart* v. *Johnston*, 389 F. 2d 239, 241 n. 2 (C. A. 6, 1968); *Rains* v. *Cascade Industries, Inc.*, 402 F. 2d 241, 245 (C. A. 3, 1968); *M. Snower & Co.* v. *United States*, 140 F. 2d 367, 369 (C. A. 7, 1944); 6 *Moore*, Federal Practice, 2d ed., ¶ 56.13.

satisfied by the trial court's reference, in its conclusions of law, to a "deliberate policy" of United. (*Infra,* p. A22.)

The requirement of a finding of intentional violation under Section 706(g) relates to remedy, and assumes that a violation already exists. *Richards* v. *Griffith Rubber Mills,* 300 F. Supp. 338, 341, 341 n. 4 (Ore., 1969). Hence, the defense is not the same as the good faith reliance defense under Section 713(b) which is a bar to the action. By finding a violation on summary judgment, and simultaneously finding that respondent Sprogis was entitled to be compensated for loss of earnings, the trial court effectively blocked United from offering any facts or arguments in support of its denial that the alleged violation had been intentional. The affirmance by the majority of the Court of Appeals renders Section 706(g) virtually meaningless, since it holds, in effect, that "intentional" means intent to do the act, not intent to violate the statute. The legislative history—which neither the trial court nor the Court of Appeals considered—is not quite so dispositive. Senator Dirksen thought "intentional" meant "willful". 110 Cong. Rec. 8194. Senator Humphrey said: "The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate." 110 Cong. Rec. 12723-24. Summary disposition foreclosed any opportunity to explore United's "intent".

In rejecting United's Section 713(b) defense on respondent's motion for summary judgment, the majority violated fundamental principles applicable to test the propriety of a motion for summary judgment. It tried issues of fact. "But it is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." *American Mfrs. Mutual Ins. Co.* v. *American*

Broadcasting-Paramount Theatres, 388 F. 2d 272, 279 (C. A. 2, 1967). The majority drew all inferences in the light most favorable to the moving party. However, "On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold,* 369 U. S. 654, 655 (1962). See also *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 157 (1970).

Most grievous of all, the majority relied on "evidence" not part of the record: "Moreover, the representations of the Commission itself, before this Court as *amicus curiae,* disclose that the purported 'letter of opinion' was instead a September 22, 1965 internal agency memorandum. . . ." (*Infra,* p. A21.) Aside from the fact that this conclusion is completely at odds with the facts set forth in United's affidavit, it is based on material which was not present in the trial court and which United has had no opportunity to test by cross-examination.

In short, the majority of the Court of Appeals, in the guise of affirming the granting of a motion for summary judgment, has in fact conducted a trial in which it has relied on material not of record.

The majority concluded that the September 22 opinion meant only that "definitive judgment on the legality of the no-marriage rules must be suspended pending further determination by the Commission of possible Section 703 (e)(1) exemption." (*Infra,* p. A21.) But the opinion clearly posed the possibility that the Commission might find female sex a bona fide occupational qualification, in which case the no-marriage policy could be maintained. If United and other airlines were expected to revoke the policy because of the earlier Commission ruling, there would have been no point to the BFOQ inquiry; for then, even if the Commission were to find female sex to have

been a BFOQ, the no-marriage policy which led to the inquiry in the first instance would have by then disappeared.

Thus, a reasonable inference to be drawn from the language of the General Counsel's Opinion—and one which should have been assumed for the purposes of deciding respondent's motion for summary judgment—was that the rule could be maintained without risk of interim violation until the Commission ruled on the BFOQ issue.

The majority also held that, in any event, the September 22 opinion was not an opinion within the meaning of the Commission regulation that a "written interpretation or opinion" had to be called an "opinion letter" and signed by the General Counsel on its behalf. Rather, it "was instead a September 22, 1965, internal agency memorandum"—this conclusion being based on "representations of the Commission itself, before this Court as *amicus curiae.*" (*Infra,* p. 21.)

This conclusion is simply indefensible. It is a complete denial of the right to trial to have summary judgment entered against a party on "evidence" first presented in the Court of Appeals. In any event, the Commission representation that the September 22 opinion was merely an internal agency memorandum is completely inconsistent with the undisputed facts set forth in United's affidavits.

The September 22 opinion was written in response to an inquiry from the Air Transport Association. A copy was given Northwest Airlines, an Association member, by the Commission itself. (App. 28.) Northwest, United and the Air Transport Association cited the opinion in briefs to the Commission on the BFOQ issue. (App. 30-33.) The Commission, in November 1965, published a digest of the opinion, referencing it as "GC Opin. 9-22-65." "GC Opinion" was defined by the Commission in its publication as "an interpretative opinion of the General Counsel, *specifically*

adopted by the Commission." (App. 28; Emphasis added.) This would hardly lead one to believe this was merely an "internal agency memorandum," and not an opinion on which the public could rely.

And after the Commission knew United and other airlines were in fact relying on the opinion because they had cited it to the Commission during the period March through May, 1966, the Commission republished the digest of the September 22, 1965 opinion as reflecting "current Commission policy."

Against all this is the representation, first made before the Court of Appeals, that this was merely an "internal agency memorandum."

Clearly, the Commission was speaking through its General Counsel; it published and specifically adopted his opinion as its own; it persisted in this publication with full knowledge of reliance by United and others.

> ". . . Congress desired to make this defense available to employers who honestly had been misled by their own government speaking through one of its authorized spokesmen to pursue a course of action which ultimately is found to be at variance with its laws." *Kam Koon Wan* v. *E. E. Black Ltd.*, 75 F. Supp. 553, 561 (Hawaii, 1948).[7]

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7. This related to the comparable defense under Sections 9 and 10 of the Portal-toPortal Act, 29 U. S. C. Sections 258-259. The Portal-to-Portal defense and the defense under Section 713(b) of the Civil Rights Act of 1964 have been held to be similar in nature. *Air Transport Ass'n* v. *Hernandez et al.*, 264 F. Supp. 227, 229 (Dist. Col., 1967).

United is apparently not the only employer to have been misled by the Commission. On December 8, 1970, after briefs had been filed in the Court of Appeals in this case, but before oral argument, the Commission caused a statement to be published in the Federal Register "in order to dispel an apparent misunderstanding on the part of a number of respondents." The statement disclaimed any intent on its part that matter appearing in its Digests of Legal Interpretations be "a written interpretation or opinion of the Commission." 35 Fed. Reg. 18692. After argument, the Commission filed a copy of this statement with the Court of Appeals.

The conclusion of the majority that "the memorandum was not intended as the basis for employer reliance" would fail as being against the manifest weight of the evidence. That it would be reached in support of a motion for summary judgment is simply an abandonment of the rule of law.

"We look at the record on summary judgment in the light most favorable to . . . the party opposing the motion . . ." *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473 (1962). Unless the rule be different in Title VII cases, we respectfully urge the granting of this petition for the purpose—if no other—of redressing this abuse of judicial process.

III.

THE CLASS ACTION.

The instant action was not brought as a class action. Neither respondent, the trial court nor the Court of Appeals contended that it was. Nevertheless, the trial court as a part of its decree retained jurisdiction to consider the possibility of extending relief to other stewardesses similarly discharged by United's enforcement of its no-marriage rule.

Supporting that position, the Court of Appeals in substance states that a suit brought under Title VII is necessarily a class action regardless of the intention of the party bringing it, regardless of the failure of the complaint to allege what under Rule 23 of the Federal Rules of Civil Procedure are stated to be "Prerequisites to a Class Action" and regardless of the failure of the trial court to take the procedural action required under Rule 23(c)(1).

The majority stated: "In its present posture, this case presents the bald question of the court's power to grant such relief where justice requires such action. In our

opinion, Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases." (*Infra,* p. A23.) The Court thus concedes that Rule 23 would preclude such action, and then rewrites Rule 23 as it applies to Title VII cases.

This conversion of an individual action into a class action after judgment was precisely one of the evils which the 1966 amendments to Rule 23 were designed to eliminate. So-called "one-way" intervention where members of a class might be permitted to intervene after a favorable decision on the merits, but where they would not be bound by an adverse decision, was foreclosed. "Under proposed subdivision (c)(3) [of Rule 23], one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class . . ." Notes of Advisory Committee on Federal Rules, 28 U. S. C. foll. Rule 23.

Every other court which has examined into the relationship of class action under Title VII and Rule 23 has held that the requirements of the Rule must be followed.

Early decisions under Title VII had held that a class action would not lie since each claimant had to satisfy the obligation to file a charge with the Commission as a jurisdictional prerequisite to court action. In reversing a lower court decision to this effect, the Fifth Circuit Court of Appeals in *Oatis* v. *Crown Zellerbach Corp.,* 398 F. 2d 496, 499 (C. A. 5, 1968), held that a class action is permissible under Title VII. But to qualify, "the class action must . . . meet the requirements of Rule 23(a) and (b)(2)."

Oatis was followed by *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28, 34 (C. A. 5, 1968), which, in commenting on *Oatis,* pointed out that "The holding that the nature of the claims asserted make it a 23(b)(2) class action was expressly recognized in the Advisory Committee's Note." The Notes on

Rule 23(b)(2) specifically state that the Rule is applicable to "various actions in the civil rights field."[8]

Danner v. *Phillips Petroleum Co.*, 3 Fair Employment Practice Cases 858 (C. A. 5, No. 30267, August 23, 1971), is in direct conflict with the decision here. There the Court of Appeals for the Fifth Circuit held that the plaintiff, Mrs. Danner, had been the victim of sex discrimination by her employer and affirmed the award to her by the trial court of lost wages and reinstatement of seniority and bidding rights. However, despite the fact that the action had been brought as an individual action, the trial court enjoined the employer from discriminating against any other female because of sex and retained jurisdiction for the purpose of determining whether the company had initiated a proper seniority plan for its other female employees. In the Court of Appeals the company complained that this was an award of class action relief. In agreeing, the Court of Appeals stated:

> "Mrs. Danner sued as an individual plaintiff. . . . Mrs. Danner, however, never took up the banner of women's liberation for all the female employees in the Phillips plant. This, of course, does not mean that female employees of Phillips may not take advantage of Mrs. Danner's judicial victory in the future, or indeed, that they may not join together in a class action against Phillips if they feel one is justified. But if they decide to bring a class action, it must be brought and identified as such, and the predicate for class action relief must be carefully laid. In the meantime, Mrs. Danner's victory is for her alone to taste and enjoy." (*Id.*, p. 862.)

In a footnote to this quotation, the Court stated:

> "Our denial of class action relief in the instant case by no means affects the previous rulings of this Court

8. Rule 23(c)(3), which the Advisory Committee states excludes one-way intervention, expressly covers Rule 23(b)(2) actions.

> holding . . . that class actions are permissible under Title VII. . . . All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23." (*Id.*, n. 10.)[9]

In dissenting from the majority view on the class action issue, Judge Stevens referred to the requirements of Rule 23(c)(1) and concluded his opinion:

> "At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." (*Infra*, p. A35.)

We respectfully submit that the majority of the Court below was in error and that Judge Stevens was correct. In affirming the trial court on this issue, the majority has

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9. Other courts have similarly held that the requirements of Rule 23 must be met in a Title VII class action. *Gerstle* v. *Continental Airlines, Inc.*, 50 F. R. D. 213, 216 (Colo., 1970), a case involving a class action brought by a stewardess protesting Continental Airlines' no-marriage policy: "The theory behind liberal construction of the rule [23] is that determination of the propriety of a class action is to be made at an early stage of the proceedings. . . . Despite this liberal tendency in construction of the rule, the requirements of Rule 23 must be met or a class action cannot be maintained." *Manning* v. *General Motors*, 3 Fair Employment Practice Cases 104, 105 (U. S. D. C. Ohio, No. C 69-334, January 6, 1971): "The trend under Rule 23 . . . is one of liberal construction. In being consistent with that theory of construction, a court is required to pass upon the propriety of the action at an early stage of the proceedings." *Hardy* v. *U. S. Steel Corp.*, 289 F. Supp. 200, 202 (Ala., 1967): "This case is controlled by the recent revision to Rule 23. The thrust of this revision, in the opinion of the Court, requires that the class sought to be represented be defined adequately at the beginning of the lawsuit and that a determination by the Court should be made as soon as practicable prior to trial whether the action is maintainable as a class action. . . ."

created doubt about the applicability of Rule 23 in any case where the trial court believes "justice requires" it to ignore the Rule. The majority decision is in direct conflict with that of the Fifth Circuit Court of Appeals in *Danner* v. *Phillips*.

CONCLUSION.

United Air Lines respectfully requests that for the foregoing reasons this petition for a writ of certiorari be granted.

Respectfully submitted,

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Arthur J. Kowitt,
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October 1, 1971.

APPENDIX.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable Joseph Sam Perry.

Cause No. 68 C 2311 Date November 28, 1969

Title of Cause Mary Burke Sprogis *vs.* United Air Lines, Inc.

The Court has read and considered the pleadings of the parties hereto, together with the motion for summary judgment filed on behalf of the plaintiff and the cross-motion for summary judgment filed by the defendant, together with extensive briefs and documents filed by the parties in support of and in opposition to each of said motions.

The Court is of the opinion that the motion for summary judgment filed by the defendant should be denied and that the plaintiff's motion for summary judgment should be granted.

The Court continues this matter under advisement for the entry of Findings of Fact and Conclusions of Law and a final Order. The Court directs plaintiff to present to the Court within ten (10) days suggested Findings of Fact and Conclusions of Law in proper form for entry and grants leave to defendant to present to the Court within ten (10) days thereafter its written objections thereto. The Court thereafter will rule upon said objections and enter its Findings of Fact and Conclusions of Law and a final order or decree herein.

J. S. PERRY, *J.*

Dec. 1, 1969

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable Joseph Sam Perry.

Cause No. 68 C 2311 Date January 21, 1970

Title of Cause Mary Burke Sprogis *vs.* United Air Lines, Inc.

The court has heretofore read and considered the pleadings herein and the motion of plaintiff for summary judgment and the cross-motion of defendant for summary judgment, together with extensive briefs and documents filed by the parties in support of and in opposition to said motions. The court, being of the opinion that plaintiff's motion for summary judgment should be granted and the cross-motion of defendant denied, directed plaintiff to submit to the court suggested Findings of Fact and Conclusions of Law with leave to defendant to file written objections thereto.

Said suggested findings and conclusions and a decree have been presented to the court. Defendant has filed its objections thereto, which objections the court has considered and treated as an additional brief or memorandum of the defendant in support of its motion for summary judgment in opposition to the motion of plaintiff for summary judgment.

Having considered all of the foregoing, the court hereby grants plaintiff's motion for summary judgment. Defendant's cross-motion for summary judgment is denied. Defendant's objections to plaintiff's proposed findings and conclusions and decree are overruled.

The court is entering simultaneously herewith its Findings of Fact and Conclusions of Law and Decree herein.
2 Drafts (17 & 18)

J. S. PERRY, *J.*

Jan. 23, 1970

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

MARY BURKE SPROGIS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.

Civil Action
No. 68 C 2311

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This action, having been considered on the motion of the Plaintiff for summary judgment in her behalf and the cross-motion for summary judgment filed by the Defendant, and the Court being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. This action arises under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*

2. Plaintiff is a female who was employed by Defendant as an airline stewardess until discharged by Defendant from that position on or about June 19, 1966.

3. Defendant is a Delaware Corporation, having its principal office in Elk Grove Village, Cook County, Illinois, which is within the Northern District of Illinois.

4. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer, among other practices, to fail or refuse to hire any individual or

otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of sex, except where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

5. Defendant maintained a policy applying solely to females employed as stewardesses, requiring that they be unmarried when first employed and that they thereafter remain unmarried while so employed. The policy of Defendant, as in effect at the time of Plaintiff's discharge, called for the discharge of any stewardess who married.

6. Defendant employs both male and female employees; there is no policy, as described in Paragraph 5 above, which has been maintained or enforced against male employees, including male flight cabin attendants or stewards. Under the policy described in Paragraph 5, Defendant has dismissed from their positions females employed as stewardesses immediately upon notification of the marriage of such employees, but no action is or has been taken against male employees upon marriage, and male employees have been permitted to continue employment without regard to marital status.

7. Pursuant to the above policy Defendant discharged Plaintiff as a stewardess on or about June 19, 1966, for the sole reason that she is a female and became married while in the employ of Defendant in the capacity as stewardess.

8. On August 9, 1966, which was less than ninety days after her discharge by the Defendant on June 19, 1966, Plaintiff filed a formal charge with the Equal Employment Opportunity Commission pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, alleging that her discharge by Defendant constituted unlawful discrimination because of sex.

9. On August 30, 1968, the Equal Employment Opportunity Commission issued its Decision finding there is

reasonable cause to believe that the Defendant had violated Title VII of the Civil Rights Act of 1964, prohibiting discrimination on the basis of sex, by maintaining a policy of terminating female flight cabin attendants upon marriage, and, specifically, by terminating Plaintiff as alleged in the charge described in Paragraph 8 above while permitting male employees, including stewards performing similar duties for Defendant, to continue their employment after becoming married.

10. The charge of Plaintiff was not settled or adjusted. Under date of October 31, 1968, the Equal Employment Opportunity Commission issued to Plaintiff its Notice of Right to Sue Within 30 Days, advising Plaintiff that she could, within thirty days of her receipt of the Notice, file suit in an appropriate United States District Court. This action was commenced on November 27, 1968.

11. Plaintiff has filed a motion for summary judgment, asserting that there is no genuine issue as to any material fact. Defendant has filed a counter-motion for summary judgment.

12. The Court has reviewed all the matters of record and has had the benefit of briefs filed by the parties.

Conclusions of Law.

1. This Court has jurisdiction of the parties and of the subject matter hereof.

2. On the basis of the foregoing facts, as to which there is no dispute, Plaintiff is entitled to judgment as a matter of law.

3. The rule, regulation or policy of Defendant, United Airlines, Inc., pursuant to which it discharged Plaintiff, is unlawful as in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The discharge of

the Plaintiff by the Defendant pursuant to such policy was an unfair employment practice in violation of Title VII of the Civil Rights Act of 1964.

4. Plaintiff is entitled to reinstatement in her position as a Stewardess in the employ of Defendant United Air Lines, with all her rights of seniority and longevity restored.

5. Plaintiff is entitled to be compensated for her loss of earnings from the time of her illegal discharge on June 19, 1966 until the date of her reinstatement.

6. An order of injunction should issue restraining the Defendant from discriminating against Plaintiff because of her sex in violation of Title VII of the Civil Rights Act of 1964, and specifically from refusing to continue Plaintiff in Defendant's employ by reason of her marriage and requiring Defendant, in connection with the restoration of Plaintiff to employment, to recognize all of the Plaintiff's rights of seniority and longevity of employment which would have accrued to Plaintiff but for her unlawful discharge, and requiring Defendant to pay to Plaintiff all compensation lost by her from the time of her illegal discharge to the date of her reinstatement.

7. Defendant is not entitled to any relief as prayed for in its counter-motion for summary judgment, and said motion should be and hereby is denied.

8. The matters asserted by Defendant by way of defense are not sufficient to show (a) that sex or single status is a bona fide occupational qualification for the position of airline stewardess, or (b) that Defendant acted in reliance upon a written opinion of the Equal Employment Opportunity Commission within the meaning of Section 713(b) of the Civil Rights Act of 1964.

9. Since the record does not disclose the amount of compensation lost by Plaintiff, the Court should and hereby

does retain jurisdiction for the purpose of enforcing this order and for the purpose of determining, by appropriate proceedings, the precise amount of compensation to which Plaintiff is entitled.

10. By reason of the circumstance that Plaintiff was discharged pursuant to a deliberate policy of Defendant and that, in consequence, it appears probable that other female employees of Defendant were discharged under circumstances in all significant respects identical to those under which Plaintiff was discharged, the Court should and hereby does retain jurisdiction for the purpose of determining whether the scope of the relief herein ordered should be made applicable to other Stewardesses discharged by Defendant pursuant to the policy herein determined to be illegal as in violation of Title VII of the Civil Rights Act of 1964.

Dated: January 21, 1970.

Enter:

/s/ J. S. PERRY,

Judge.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

MARY BURKE SPROGIS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.

Civil Action
No. 68 C 2311

DECREE.

This action having been considered on the motion of plaintiff for summary judgment in her behalf and the cross-motion for summary judgment filed by the defendant, the court having considered all matters of record and being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

It is hereby Ordered, Adjudged and Decreed:

1. Plaintiff's motion for summary judgment is hereby granted.

2. Defendant's cross-motion for summary judgment is hereby denied.

3. Defendant, its officers, agents, and employees is hereby enjoined and restrained from discriminating against plaintiff because of her sex in violation of Title VII of the Civil Rights Act of 1964 and from refusing to continue plaintiff in its employ by reason of her marriage; and defendant is hereby commanded and ordered to restore plaintiff to employment with all her rights of seniority and

longevity intact and unimpaired, precisely as they would have accrued but for the unlawful discharge.

4. Defendant, its officers, agents and employees, is hereby commanded and ordered to pay to plaintiff that amount of money which will compensate her in full for all pay lost from the time of her illegal discharge on June 19, 1966, to the date of her reinstatement.

5. The Court retains jurisdiction for the purpose of enforcing this Order and for the purpose of determining the precise amount of compensation to which plaintiff is entitled. Within twenty (20) days of the date of this Order, the plaintiff shall submit, in the form of a supplemental pleading, a claim for compensation, setting forth the amount she asserts she is entitled to and the method of computation thereof; defendant shall have twenty (20) days to answer, and plaintiff shall have ten (10) days to reply. The matter will thereupon be set down for hearing upon appropriate notice before a Special Master in Chancery, hereinafter appointed, to take testimony and to make a written recommendation for a money decree.

6. The court hereby appoints David J. Shipman as said Special Master in Chancery to take testimony and make a recommendation for a money decree herein. Said Special Master's fees shall be fixed by the court and said fees and his costs shall be assessed as costs herein. The court does now order that said Special Master in Chancery shall have the power to administer oaths, issue subpoenas duces tecum and shall have the power to order documents produced by either of the parties. The court further orders that said Special Master shall conduct and supervise all discovery proceedings, shall rule upon all motions concerning discovery, and shall order the taking of depositions or quashing of notices and rule on other routine and contested matters concerning discovery. The court does not intend that said Special Master in Chancery shall be consulted on the

routine taking of depositions where there is no controversy between the parties. Said Special Master shall report progress herein to the court within ninety (90) days after this judgment order becomes final by virtue of no appeal being taken within the time for appeal or after a mandate of affirmance in the event of appeal.

7. Within twenty (20) days of the date of entry of this order, plaintiff shall submit, in the form of a supplemental or amended pleading, or in the form of suggestions to the court, any matters which plaintiff considers pertinent to a consideration of the issue of whether the scope of the relief herein ordered should be made applicable to other stewardesses discharged by defendant pursuant to the policy herein determined to be illegal as in violation of Title VII of the Civil Rights Act of 1964. Defendant shall have twenty (20) days to answer, and the plaintiff shall have ten (10) days to reply. The matter will thereupon be set down for hearing upon appropriate notice, and the court retains jurisdiction for the purpose of determining any and all questions thus presented.

8. The court also retains jurisdiction for the purpose of hearing applications for attorneys fees and any issues as to costs.

ENTER:

/s/ J. S. PERRY,
Judge.

Dated: Chicago, Illinois, January 21, 1970.

AMENDMENT TO DECREE.

The Decree heretofore entered herein on January 21, 1970 is hereby amended as of the date hereof by adding thereto the following:

"9. This court is of the opinion that this Decree involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Decree may materially advance the ultimate termination of the litigation.

"10. It is ordered that this Decree and all proceedings hereunder shall be stayed until time for defendant to appeal from the Decree or to petition the United States Court of Appeals for the Seventh Circuit for leave to appeal from the Decree has expired without such appeal having been taken or such petition filed, or until such appeal or petition and any appeal pursuant thereto is finally determined by the Court of Appeals."

ENTER:

/s/ J. S. PERRY,
Judge.

Dated: Chicago, Illinois, February 10th, 1970.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1970 — January Session, 1971

No. 18481

MARY BURKE STROUD, *Plaintiff-Appellee,*

vs.

UNITED AIR LINES, INC., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 16, 1971

Before CUMMINGS, KERNER, and STEVENS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal raises the question whether United Air Lines, Inc. ("United") violated Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-2(a)(1)) by discriminating against plaintiff because of her sex.[1]

Prior to June 19, 1966, plaintiff was employed by United as a flight cabin attendant or stewardess. On that

1. Section 703(a)(1) provides in part:
"It shall be an unlawful employment practice for an employer—
"(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; • • •." 42 U. S. C. § 2000e-2(a)(1).

date, she was discharged for violating a company policy in effect at that time which required that stewardesses must be unmarried.[2] United employed and continues to employ both male and female employees, including male flight cabin attendants or stewards on overseas flights. No policy or rule restricting employment to single males has ever been enforced. Nor have female employees other than stewardesses been subjected to any similar requirement.

In August 1966, plaintiff filed a charge with the Equal Employment Opportunity Commission alleging that her discharge constituted unlawful discrimination because of sex in violation of Section 703(a)(1) of the Civil Rights Act of 1964. Processing of this and similar charges against airlines was suspended by the Commission pending completion of hearings on the request of several airlines, including United, for a written opinion that female sex was a bona fide occupational qualification within the meaning of Section 703(e)(1) of Title VII of the Act. 42 U. S. C. § 2000e-2(e).[3] After extended hearings, the

2. The no-marriage rule, requiring that female flight cabin attendants be single when first employed and remain unmarried under penalty of discharge, was first applied by United in the mid-1930's. By letter of agreement effective November 7, 1968, United agreed with the Stewardesses and Flight Stewards of United, as represented by the Air Lines Pilot Association, International, that

> "marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess, but any Stewardess who shall hereafter become pregnant shall have her services with the Company permanently severed as a Stewardess • • •."

The agreement does not abandon the single status requirement with respect to hiring. This Court expresses no opinion on the legality of that portion of the agreement which permanently severs any pregnant stewardess from United's employment.

3. Section 703(e)(1) provides in part:

> "(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for

Commission ruled on February 23, 1968, that female sex was not a bona fide qualification for the position of flight cabin attendant and reserved resolution of questions concerning the "no-marriage" rule for "individual Commission decisions in pending charges." In August 1968, the Commission concluded that there was reasonable cause to believe that United had violated Section 703(a)(1) by discharging plaintiff. Two months thereafter, the Commission notified plaintiff of her right to sue her former employer in the district court, and this action was commenced a month later.

On cross-motions for summary judgment, the district court found that plaintiff was discharged about June 19, 1966, because of her marriage. Although United then employed only unmarried stewardesses, it permitted its male stewards to be married. The court held that United's discharge of plaintiff was an unlawful employment practice and granted her motion for summary judgment. The court concluded that she was entitled to reinstatement, including the restoration of her seniority and longevity rights. Jurisdiction was retained in order to determine her loss of earnings and whether the same relief should be accorded to similarly discharged United stewardesses.

Simultaneously, the court entered a decree enjoining United from discriminating against plaintiff because of her sex and ordering United to restore her to employment

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a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *." 42 U. S. C. § 2000e-2(e).

and to pay her compensation "for all pay lost from the time of her illegal discharge on June 19, 1966, to the date of her reinstatement." David J. Shipman of the Chicago Bar was appointed master in chancery to make a recommendation for a money decree. Plaintiff was ordered to submit suggestions with respect to "the issue of whether the scope of the relief herein ordered should be made applicable to other stewardesses discharged by defendant." Further proceedings below were stayed while an interlocutory appeal was perfected pursuant to Section 1292(b) of the Judicial Code. 28 U. S. C. § 1292(b). We affirm.

United's No-Marriage Rule for Stewardesses Discriminates on the Basis of Sex

United first disputes the finding of the district court that the no-marriage rule for stewardesses involves discrimination because of sex. Relying upon *Cooper* v. *Delta Air Lines*, 274 F. Supp. 781 (D. C. La. 1967), United urges that the qualification merely distinguishes between classes of employees within the job category of stewardess in the same manner as educational or physical requirements.

In 1965 the Equal Employment Opportunity Commission considered the applicability of Section 703(a)(1) to discrimination against married women and determined that

> "• • • an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex." 29 CFR § 1604.3(a).

This interpretation of the Act is "entitled to great deference." *Griggs* v. *Duke Power Co.*, ___ U. S. ___, ___.

We adopt it as both reasonable and consistent with the legislative policies and history of Title VII.

The scope of Section 703(a)(1) is not confined to explicit discriminations based "solely" on sex.[4] In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex (cf. *Cheatwood* v. *South Central Bell Telephone and Telegraph Co.*, 303 F. Supp. 754, 759-760 (M. D. Ala. 1969)) or through the unequal application of a seemingly neutral company policy. Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542.

Viewing the class of United's married employees, it is clear that United has contravened Section 703(a)(1) by applying one standard for men and one for women. Cf. *Phillips* v. *Martin Marietta Corp., supra.* Concededly, the marital status rule applicable to stewardesses has been applied to no male employee, whatever his position. More pointedly, no male flight personnel, including male flight cabin attendants or stewards, have been subject to that condition of hiring or continued employment.

It is irrelevant to this determination of discrimination that the no-marriage rule has been applied only to female employees falling into the single, narrowly drawn "occupa-

4. Congress specifically rejected an amendment to the Act which would have so limited the force of the prohibition against sex discrimination. Such a limitation, it was felt, would emasculate the Act. See 110 Cong. Rec. 2728, 13,825.

tional category" of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United's claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within the job category. Considerations of the peculiar characteristics of the position only pertain to the claim of a bona fide occupational qualification under Section 703(e)(1). See 29 CFR § 1604.3(b);[5] cf. *Phillips* v. *Martin Marietta Corp., supra.*

The Marital Status Rule Is Not Justified as a Bona Fide Occupational Qualification

United's second contention is that under Section 703 (e)(1) (note 3 *supra*) the no-marriage rule reflects a bona fide occupational qualification for the position held by stewardesses. Its argument rests upon the acceptance of three propositions: first, the duties currently performed by stewardesses are uniquely different from those assigned to other flight personnel; second, sex constitutes a valid criterion for filling the position of stewardess; and third, the no-marriage rule may therefore be interposed as an additional requirement for such employment.

We find it unnecessary to consider the validity of United's claim that sex constitutes a bona fide occupational requirement for the job of airline stewardess. Even assuming that Section 703(e)(1) might justify hiring only

5. 29 CFR § 1604.3(b) provides:

"It may be that under certain circumstances, such a rule [against married females] could be justified within the meaning of Section 703(e)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work."

females for that position, that conclusion would not automatically legitimate the no-marriage rule imposed exclusively upon stewardesses. A valid discrimination in favor of women generally in filling that occupational position need not warrant the imposition of an additional qualification which operates discriminatorily against those employees by comparison to United's male employees. United's no-marriage rule must stand upon its own feet. If, and only if, that requirement reflects an inherent quality reasonably necessary to satisfactory performance of the duties of stewardesses can the no-marriage rule be supported. See 29 CFR § 1604.3(b) (note 5 *supra*).

United has failed to offer any salient rationale in support of its marital status policy. The only reason specifically addressed to that rule is that United was led to impose the requirement after it received complaints from husbands about their wives' working schedules and the irregularity of their working hours. This is clearly insufficient. Section 703(e)(1) specifically requires a correlation between the condition of employment and satisfactory performance of the employees' occupational duties. The complaints of spouses do not suffice as an indicator of employee competence. Moreover, by its very terms, the narrow exception in Section 703(e)(1) calls for employers to treat their employees as individuals. United's blanket prophylactic rule prohibiting marriage unjustifiably punishes a large class of prospective, otherwise qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts.

Similarly, the argument advanced by United in support of its policy of hiring only females for this position fall short of establishing a basis under Section 703(e)(1) for its no-marriage rule. The marital status of a stewardess cannot be said to affect the individual woman's

ability to create the proper psychological climate of comfort, safety, and security for passengers. Nor does any passenger preference for single stewardesses provide a valid reason for invoking the rule. See 29 CFR § 1604.1(a)(iii);[6] *Diaz* v. *Pan American World Airways, Inc.*, ... F.2d ....., ... (5th Cir. 1971).

United has presented no direct, rational, or reasonably limited connection between marital status, job performance, and its no-marriage rule for stewardesses. United has failed to explain why marriage should affect female flight cabin attendants' ability to meet the requirements of that position while at the same time leaving unimpaired the capabilities of male flight personnel, particularly stewards. Nothing in the job descriptions given by United offers a basis for that disparate treatment. Nothing in the institution of marriage necessarily compels the distinction. Accordingly, we hold that the district court properly granted summary judgment in favor of the plaintiff on this issue.

United's Defense of Good Faith Reliance Upon the Written Interpretation and Opinion of the Equal Employment Opportunity Commission Is Inapplicable

United also asserts that its rule should not give rise to liability under Title VII of the Civil Rights Act since it "was in good faith, in conformity with, and in reliance on [a] written interpretation or opinion" of the Equal

6. 29 CFR § 1604.1(a)(iii) provides:

"The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: • • •

"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph [permitting sex to be a bona fide occupational qualification for the purpose of authenticity or genuineness, as in the case of an actor or actress]."

Employment Opportunity Commission within the meaning of Section 713(b)(1) of the Act.[7]

On July 1, 1965, the Commission published a regulation defining the phrase "written interpretation or opinion of the Commission" in Section 713(b) as having reference to

> "[o]nly (a) a letter entitled 'opinion letter' and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the Federal Register may be considered a 'written interpretation or opinion of the Commission' within the meaning of section 713 of Title VII." 30 Fed. Reg. 8407; 29 CFR § 1601.30.

This agency interpretation of the operative statutory language reasonably confines reliance justified under Section 713(b) to considered official expressions of opinion taking two specifically defined forms. As Judge Wisdom observed in *Local 189, United Papermakers* v. *United States*, 416 F. 2d 980, 997 (5th Cir. 1969), certiorari denied, 397 U. S. 919, "[a] broader reading might bind the Commission to informal or unapproved opinions volunteered by members of its staff."

United does not contend that it relied upon anything published in the Federal Register by the Commission. Instead United relies upon a so-called "letter of opinion" of the Commission's General Counsel as to the applicability to the airline industry of the Commission's ruling on

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[7] Section 713(b)(1) provides in part:

"In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance upon any written interpretation or opinion of the Commission." 42 U. S. C. §2000e-12(b).

discrimination against married women.[8] Nothing in United's affidavit, however, supports the claim that this document was in fact an "opinion letter" issued on proper request pursuant to applicable agency procedures. See 29 CFR §§ 1601.29, 1601.30. Significantly, the document referred to in United's affidavit lacked the letterhead of the Commission and did not reveal the addressee. There is no indication that the General Counsel's letter was "entitled 'opinion letter'" or signed by the General Counsel on behalf of the Commission as required by the interpretive regulation. Moreover, the representations of the Commission itself, before this Court as *amicus curiae*, disclose that the purported "letter of opinion" was instead a September 22, 1965, internal agency memorandum from the General Counsel to the Director of Compliance with respect to the latter's handling of inquiries he received.

Apart from the formal insufficiencies apparent from United's affidavit, the content of the September 22, 1965, Commission memorandum itself also fails to support a claim of good faith reliance upon an official opinion letter. The memorandum merely states that definitive judgment on the legality of no-marriage rules must be suspended pending further determination by the Commission of possible Section 703(e)(1) exemptions. The only "opinion" expressed was that the circumstances existing at that time prevented an unequivocal ruling that the guideline on discrimination against married women invalidated airlines' no-marriage rules for stewardesses. The memorandum does not indicate a considered legal judgment approving the policy under the Act. Accordingly, we must conclude

8. No sworn or certified copy of this document was attached to United's affidavit supporting its cross-motion for summary judgment, as required by Rule 56(e) of the Federal Rules of Civil Procedure. But since no objection was pressed below, we deem it waived. *Noblett* v. *General Electric Credit Corp.*, 400 F. 2d 442, 445 (10th Cir. 1968), certiorari denied, 393 U. S. 935; see generally 6 *Moore's Federal Practice*, ¶ 56.22[1], pp. 2814-2817 (1966).

that the memorandum was not intended as the basis for employer reliance now claimed by United.

Intentional Violation Unnecessary

United seeks to escape responsibility on the ground that it was not intentionally violating Title VII. Such an argument has been rejected by the Fifth and Tenth Circuits, which have construed "intentionally" in Section 706(g) as meaning the employment practice must be deliberate rather than accidental.[9] *Local No. 189, United Papermakers* v. *United States*, 416 F. 2d 980, 996 (5th Cir. 1969), certiorari denied 397 U. S. 919; *Jones* v. *Lee May Motor Freight, Inc.*, ... F. 2d ..... (10th Cir. 1970). We agree with that construction of the Act. Cf. *Griggs* v. *Duke Power Company*, ... U. S. ....., ... The district court's conclusion that defendant's policy was "deliberate" was justified by the record and satisfies Section 706(g).

The District Court Had Jurisdiction to Provide Relief to Individuals Similarly Situated

As part of its decree, the district court retained jurisdiction to consider the possibility of extending relief to other stewardesses similarly discharged by United's enforcement of its no-marriage rule. Accordingly, the court

9. Section 706(g) provides in part:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)." 42 U. S. C. § 2000e-5(g).

ordered plaintiff to submit amended or supplemental pleadings, or suggestions on that matter, and gave United leave to respond. United attacks this portion of the decree as inconsistent with the policy of Rule 23 of the Federal Rules of Civil Procedure. It urges that the "class" aspect of a Title VII action must be established prior to judgment on the merits. We need not anticipate and resolve the array of issues which may arise in the determination of the propriety of class relief. In its present posture, this case presents the bald question of the court's power to grant such relief where justice requires such action. In our opinion, Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases.

The vindication of the public interest expressed by the Civil Rights Act constitutes an important facet of private litigation under Title VII. In *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (7th Cir. 1969), Judge Kerner recognized that such a suit is necessarily a class action "as the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion or national origin." See also *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28, 33 (5th Cir. 1968). At stake, therefore, are the interests of the other members of that class, and the court has a special responsibility in the public interest to devise remedies which effectuate the policies of the Act as well as afford private relief to the individual employee instituting the complaint. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d at p. 715; *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303, 311-312 (5th Cir. 1970); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 428-429 (8th Cir. 1970).

Section 706(g) of the Act (note 9 *supra*) grants to federal courts plenary powers to fashion affirmative relief eradicating present discrimination and redressing the adverse consequences of past unlawful conduct. Cf. *Local*

53 of International Ass'n of Heat & Frost I. G. A. Workers v. *Vogler*, 407 F. 2d 1047, 1052-1053 (5th Cir. 1969). In *Bowe*, we held that this power "should be broadly read and applied so as to effectively terminate the practice and make its victims whole." 416 F. 2d at p. 721. In order to accomplish that result, we ordered that the "relief should be made available to all who were so damaged; whether or not they filed charges and whether or not they joined in the suit." *Id.*; cf. *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 224.

In affirming the district court's power to consider extending relief beyond the named plaintiff, we express no opinion on the ultimate decision to be reached upon remand. Whether such relief is appropriate in this case must first be determined by the court below after consideration of the arguments advanced by the parties, including references to the safeguards of Rule 23. We merely hold today that the court may so proceed.

Injunctive Relief Was Permissible

Finally, United asserts that injunctive relief was improper because it had rescinded its no-marriage policy and had reinstated the plaintiff. However, when United rescinded its no-marriage policy in February 1968, previously terminated stewardesses were to be reinstated only on condition of their waiver of back pay, so that all effects of United's discriminatory policy had not been erased. Indeed, United's first offer to reinstatement to this plaintiff was also conditioned upon waiver of her back pay, and its final offer of reinstatement with back pay was not until January 3, 1969, after the filing of this complaint.[10] In such circumstances, no abuse of the district

10. The record does not show whether United has offered other stewardesses unconditional reinstatement. The November 7, 1968, letter agreement between United and the Airline Pilots Association International, does not discuss back pay nor whether United may hire only unmarried stewardesses. See note 2 *supra*.

court's discretion has been demonstrated. *Cypress* v. *Newport News General & Nonsectarian Hospital Ass'n.*, 375 F. 2d 648, 658 (4th Cir. 1967); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719-721 (7th Cir. 1969).

The decree below is affirmed, and the cause is remanded for further proceedings.

STEVENS, *Circuit Judge*, dissenting. If, except for his sex, plaintiff's husband had precisely the same job qualifications as plaintiff, he would not have been eligible for employment as her replacement. United's requirements for employment as a flight cabin attendant simultaneously discriminated against Mr. Sprogis because of his sex and against Mrs. Sprogis because of her sex.

Since there are only two sexes, a reading of § 703(a)(1) of the Civil Rights Act of 1964[1] which leads to such an anomalous result cannot be correct. In addition, I believe United's affirmative defenses under §§ 703(e)[2] and 713(b)[3] raised issues of fact which precluded entry of summary judgment. Finally, I do not believe either the statute or Rule 23 of the Federal Rules of Civil Procedure authorizes the conversion of an individual claim into a class action after a decision on the merits.

I.

Plaintiff does not claim that United has been guilty of any company-wide discrimination against females. About 30% of the company's employees are females and about one-third of the female employees are married.[4] It is in the

1. 78 Stat. 255; 42 U. S. C. § 2000e-2(a)(1).

2. 78 Stat. 256; 42 U. S. C. § 2000e-2(e).

3. 78 Stat. 265; 42 U. S. C. § 2000e-12(b).

4. As of May, 1969, United had a total of 14,637 female employees, of whom approximately 4,700 were married. (A. 67).

category of stewardesses that United is accused of discriminating against females because of their sex. The record demonstrates, however, that in this category United's hiring policies have discriminated in favor of females for many years. Indeed, no male was eligible for the position which plaintiff occupied at the time of her discharge in 1966.

At the end of that year United employed 48 stewards and 3,289 stewardesses. The stewards were employed only on Hawaiian flights, and were required to have job qualifications which plaintiff did not possess.[5] For reasons unrelated to her sex, plaintiff was not eligible for the work performed by these 48 males. On the other hand, solely because of sex, no male was eligible for the position which plaintiff and 3,288 other females occupied in 1966.[6]

Although the qualifications for the position of male steward were narrowly drawn, stewardesses were one of United's largest classification of employees. Neither the classification of stewardesses, nor the limited category of male stewards on Hawaiian flights, is challenged under § 703(a)(2). The issues arise under § 703(a)(1) and, in my opinion, would be no different if United had never employed a male steward.[7] The Equal Employment Opportunity Commission makes the same objection to the no

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5. A minimum of 10 years residence in the Hawaiian Islands and a familiarity with Hawaiian customs, traditions and tourist atttractions. (A. 81)

6. Female sex was a qualification for the job of "stewardess" which was the only kind of flight cabin attendant United employed (except on the Hawaiian flights and on certain overseas charter flights for the military).

7. They would, however, be different if United had employed males and females in the same job classification and applied a no marriage rule against females only. *Cf.*, *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 592.

marriage rule as applied by air lines which employ no male stewards at all as it does in this case.[8]

Under the Commission's analysis of the statute, the validity of the no marriage rule turns on the question whether United can justify female sex as a bona fide occupational qualification for the position of stewardess under § 703(e). The Commission withheld any expression of opinion about the no marriage rule for over two years,[9] expressly stating in the interim that its opinion would depend on its answer to the BFOQ question.[10] All parties have assumed that if United could lawfully limit its employment of flight cabin attendants to females, the no marriage rule would be valid. Thus, under this analysis, the sufficiency of plaintiff's prima facie case under § 703(a)(1) is made to depend upon the unavailability of United's affirmative defense under § 703(e).

As a matter of statutory construction, the Commission's analysis of the relationship between plaintiff's prima facie case and the BFOQ defense is untenable. The scope

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8. See *Neal* v. *American Air Lines*, Case No. 6-6-5759, C. C. H. Employment Practice Guide, ¶ 8502, June 20, 1968. In its decision in this case, the Commission stated:

> "Even if Respondent did not employ male flight cabin attendants, our Decision would be the same." (A. 19)

9. Plaintiff's charge was filed on August 9, 1966; the Commission's decision was dated August 30, 1968.

10. The letter of September 22, 1965, signed by the General Counsel to the Commission, stated, in part:

> "Subject to a further interpretation of Title VII by the Commission, it would be my opinion that the rule announced by Chairman Roosevelt would not apply to airline stewardesses. If an airline may give preference to females only as stewardesses, *i.e.*, if sex is a bona fide occupational qualification for the job of airline stewardesses, it would follow that an airline company could impose further qualifications with respect to such jobs and require that the employee be single and under a certain age. These additional qualifications would be consistent with the original qualification that the employee be a woman."

of the defense is not coextensive with the coverage of § 703(a)(1).[11] Moreover, as a matter of procedure, plaintiff should not be required to anticipate and disprove a defense which may or may not be available.[12] I believe this simple procedural point underlies the Supreme Court's summary reversal in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542. The acceptance of job applications from men, but not from women, with pre-school age children was plain discrimination because of sex and, therefore, covered by § 703(a)(1); but whether that discrimination could be justified under § 703(e) obviously depended on the evidence to be adduced by the defendant.[13] In my opinion, factors pertinent to the availability of the affirmative defense should not be permitted to confuse the analysis of plaintiff's prima facie case.[14]

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11. The largest category of litigation covered by § 703(a)(1) involves charges of discrimination because of race, but the BFOQ defense is not available in such cases.

12. "When a proviso like this carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre* v. *Central Altagracia,* 217 U. S. 502, 508.

13. "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act. But that is a matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.' The record [before] us, however, is not adequate for resolution of these important issues." 400 U. S. at 544.

14. The early history of the Robinson Patman Act was plagued by confusion between affirmative defenses and the prima facie case. Thus, one of the arguments laid to rest by Mr. Justice Black in *Federal Trade Commission* v. *Morton Salt Co.* was the claim that a cost justified price differential was not a "discrimination" within the meaning of the statute. See 334 U. S. 37, 44-45. See also

In this case I therefore assume that the question whether a requirement for employment has any job related justification is a matter which, although relevant under § 703(e), is of no significance whatever under § 703(a)(1). The question is simply whether the requirement discriminates against an individual because of his or her "... race, color, religion, sex, or national origin."[15] The question then is whether United discriminated against plaintiff because of her sex.

When plaintiff's marriage made her ineligible for continued employment as a stewardess, she was offered, and rejected, an opportunity to remain in United's employ in an available ground capacity in accordance with her seniority and qualifications.[16] Neither plaintiff's marriage nor her sex disqualified her from employment by United.

The no marriage rule was only one of several requirements for the position of stewardess. Each of the requirements, whether rational or irrational, was an impediment to employment as a stewardess. All of the requirements

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Standard Oil Co. v. *Federal Trade Commission* in which the Commission contended that proof of one kind of prima facie case foreclosed the affirmative defense of meeting competition in good faith. 340 U. S. 231, 250-51.

15. Of course, a requirement need not discriminate *solely* because of one of these factors. If, for example, a requirement operates "to disqualify Negroes at a substantially higher rate than white applicants," it may be discriminatory even if neutral on its face. *Griggs* v. *Duke Power Co.*, 39 L. W. 4317.

16. "17. During the time that United's no-marriage rule was in force and effect, all stewardesses who notified the Company of their intention to marry and whose employment would be terminated by application of the rule were afforded an opportunity, at their request, to remain in the employ of United in some available ground capacity in accordance with their seniority and qualifications. I am informed and believe, on the basis of a statement made by Mary B. Sprogis, that despite her failure to notify the Company of her intention to marry, she did receive and reject such an offer on or about June 19, 1966." (A. 67) This affidavit is uncontradicted; on motion for summary judgment it must be accepted as true.

discriminated against stewardesses as opposed to other females.[17] None, however, discriminated against females as opposed to males because no male was eligible for employment in the position of stewardess.

As I read § 703(a)(1), a prima facie case of discrimination is established by showing that a rule has a differential impact on one of the classes of people protected by the Act.[18] A simple test for identifying a prima facie case of discrimination because of sex is whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.[19]

Under this test, plaintiff was not the victim of discrimination because of sex, whether we assume the relevant classification is all United employees or just flight cabin attendants,[20] for she has not shown that if she were a

17. Many unmarried females would be disqualified for work as a stewardess by age, size, education, or personality qualifications.

18. "First, it should be up to the plaintiff to show that the standard in question does have a differential impact on some class of people protected by the Act. Without such a showing, it is clear the employer should be able to continue to use the standard, whether job-related or not. Moreover, the differential impact should be substantial." Developments in the Law—"Employment Discrimination in Title VII of the Civil Rights Act of 1964," 84 Harv. L. Rev. 1109, 1118.

19. "Whether based upon an unsubstantiated stereotype of the sexes, or upon valid factual data on their intrinsic differences, treatment of a person in a manner which but for that person's sex would be different is a prima facia unlawful employment practice as defined in section 703(a)." *Op. cit. supra* at p. 1170. See also:
"It is the fact of a person being a mother, *i.e.*, a woman, not the age of the children, which denies employment opportunity to a woman *which is open to a man.*" (Emphasis added.) *Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257 (5th Cir. 1969) dissenting opinion of Judge Brown at p. 1262.

20. Viewing the relevant class as United's married employees, the same standard has been applied for men and women. No married man and no married woman is eligible for employment as a stewardess. Conversely, marriage is not a disqualification for any "non-stewardess" position.

member of the opposite sex she would have had any greater employment opportunities either as a "stewardess" or as a "non-stewardess." Since the rule which is challenged disqualified all males and only some females from work in the particular job she desired (and since she does not contend that she was disqualified for work in any other position), in my opinion she was not discharged "because of [her] sex" within the meaning of § 703(a)(1).

I do not believe the Commission's contrary view is entitled to great deference because it is predicated on an untenable analysis of the statute. I have greater deference for Judge Cummings' analysis, but nevertheless am persuaded that he adopts a test of discrimination that was not intended by Congress.

As I understand the majority's test, it does not focus on the impact of a rule on the employment opportunities of the members of one sex as opposed to the other; instead, the critical inquiry is whether the rule is an irrational impediment derived from a stereotyped attitude toward females. As a matter of policy, the majority's view may not only be contemporary but also wise.[21] I am unable, however, to find any guidelines in the language of § 703(a)(1) for differentiating between irrational stereotypes and reasonable requirements. Even assuming *arguendo* that great deference should be accorded to the Equal Employment Opportunity Commission, I do not believe Congress intended to entrust the Commission with authority to draw such lines. In the long run, I believe justice will be served and the objectives of the legislation best accomplished by applying the simple comparative standard suggested by the language of the

21. It may also be unwise. The removal of irrational stereotyped categories within an area of exclusive female employment would increase the supply of eligible female applicants without changing the demand for employees and would thus tend to depress the female wage level.

statute. The benefits of an objective standard will be shared by those enforcing the statute and those faced with problems of compliance.

In my opinion, United did not violate § 703(a)(1) by discharging plaintiff from a position which she could not have retained if she had been a man.

II.

In September, 1965, the Commission issued an opinion that a rule restricting the employment of married females but not males is a prohibited discrimination because of sex. The opinion did not expressly indicate that it was intended to apply to a company or job classification in which all employees were members of the same sex. On behalf of various air lines, including United, the Air Transport Associaton therefore asked the Commission if its opinion applied to stewardesses. The written response of the Commission's General Counsel on September 22, 1965, stated, in part:

> "A question has arisen whether or not this interpretation applies to airline stewardesses, with respect to whom companies generaliy require resignation upon marriage and also reassignment within the company or retirement upon attaining the age 32.
>
> ". . . If an airline may give preference to females only as stewardesses, *i.e.*, if sex is a bona fide occupational qualification for the job of airline stewardesses, it would follow that an airline company could impose further qualifications with respect to such jobs and require that an employee be single and under a certain age. These additional qualifications would be consistent with the original qualification that the employee be a woman.
>
> "The Commission has not yet determined whether or not sex is a bona fide occupational qualification for the position of airline stewardess. . . .

> "It would be safe, I believe, to answer any inquiries on this point simply by saying that the Chairman's ruling of September 16th cannot apply to airline stewardesses until the Commission has first resolved the question of bona fide occupational qualification."

The record raises issues of fact as to whether this document was intended merely as an internal memorandum for the guidance of the Commission's staff or, as United contends, as an opinion upon which the air lines could safely rely. As I read § 713(b),[22] if United in good faith was acting in reliance on this written interpretation, plaintiff may not recover damages or back pay. I am somewhat skeptical about United's ability to prove sufficient reliance to justify a discharge (as contrasted with a refusal to hire a new employee) while the legal status of the no marriage rule was under review by the Commission, but I believe it made a sufficient factual showing to foreclose the entry of summary judgment.

I also consider it most doubtful that a job related justification for the no marriage rule can be proved. Again, however, it seems to me that the facts disclosed in United's affidavits entitled it to a hearing on the merits of its § 703 defense.[23]

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22. "(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or an account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . ."

23. ". . . The rule was founded on the belief that the irregularity and uncertainty inherent in stewardesses' work schedules were in conflict with the woman's role in married life and that such a conflict would have an inevitable adverse effect upon her job performance and motivation. This belief, which stemmed from United's own experience with married stewardesses, has since been confirmed by psychiatrists and marriage counsellors who have studied this question at the request of United and the Air Transport Association ('ATA'). These experts have concluded and

III.

A jurisdictional precondition to the commencement of a private action under Title VII of the Civil Rights Act of 1964 is the filing of a charge with the Commission within 90 days after the occurrence of the unlawful employment practice. *Choate* v. *Caterpillar Tractor Company,* 402 F. 2d 357, 359 (7th Cir. 1968). In *Bowe* v. *Colgate-Palmolive Company,* 416 F. 2d 711 (7th Cir. 1969) this court read this condition out of the statute for members of a class represented by a plaintiff who had filed the required charge.[24] If I read the district court order correctly, the court now holds that even an individual claim eliminates the jurisdictional precondition for all similarly situated persons who might have been represented in a class action. I find no authority in the statute for such an expansion of the right to sue for back pay.

Nor can I find any basis in Rule 23 of the Federal Rules of Civil Procedure for permitting an individual claim to

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reported to United directly, or through the ATA, that marriage tends to bring about changes in job attitudes which seriously impair their effectiveness as stewardesses. They tend to become preoccupied with their marital responsibilities, less dedicated, less sensitive to the needs of passengers and more resentful toward their job. . . . Again, if there are women who are able to adjust their family lives to this type of work schedule as readily as married men, United has discovered no reliable technique of selecting them out in advance of hiring.

". . . One further consideration leading to the adoption and retention of the no-marriage rule has been United's concern over the increased likelihood of pregnancy which marriage presents. Married stewardesses with unknown or intentionally concealed pregnancies represent dangers to themselves and to their unborn children and a potential source of embarrassment to the Company. Morning sickness and miscarriage due to rough weather exemplify the hazards which United wishes to avoid." (A. 64-65)

24. The holding was supported by Fifth Circuit decisions sustaining claims for equitable relief on behalf of class members who had not filed charges. See *Oatis* v. *Crown Zellerbach Corp.,* 398 F. 2d 496, 499 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28, 35 (5th Cir. 1968).

be converted into a class action after a decision on the merits. Rule 23(c)(1) provides:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair.[25]

I respectfully dissent.

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25. See Notes of Advisory Committee on Rules accompanying the 1966 revision of Rule 23 of the Federal Rules of Civil Procedure.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit,

Chicago, Illinois 60604

July 16, 1971

Before

HON. WALTER J. CUMMINGS, *Circuit Judge.*

HON. OTTO KERNER, *Circuit Judge.*

HON. JOHN PAUL STEVENS, *Circuit Judge.*

No. 18481

MARY BURKE SPROGIS,
Plaintiff-Appellee,

vs.

UNITED AIR LINES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

The petition for rehearing is denied. No member of the Court having requested a vote on the suggestion for an *en banc* rehearing, an *en banc* rehearing is also denied.

Relevant Sections of Title VII, Civil Rights Act of 1964, 42 U. S. C. § 2000e, 78 Stat. 253 et seq.

Sec. 703 (42 U. S. C. § 2000e-2). (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *

Sec. 706 (42 U. S. C. § 2000e-5). (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an ac-

tion may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Sec. 713 (42 U. S. C. § 2000e-12). (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or an account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

Rule 23 of Rules of Civil Procedure.

Rule 23. Class Actions.

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under sub-

division (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.